INTERIOR BOARD OF INDIAN APPEALS

Estate of Harvey (Harry) Mianna

38 IBIA 206 (11/13/2002)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF HARVEY (HARRY) MIANNA	:	Order Dismissing Appeal in
	:	Docket No. IBIA 02-62 and
	:	Affirming Administrative
	:	Law Judge's Decision
	:	
	:	Docket Nos. IBIA 02-29
	:	IBIA 02-62
	:	
	:	November 13, 2002

These are appeals from an October 31, 2001, Order Denying Petition for Rehearing issued by Administrative Law Judge James H. Heffernan in the estate of Harvey (Harry) Mianna (Decedent), IP SL 156G 97. Appellant in Docket No. 02-29 is Carmelita Atwine McCook. Appellant in Docket No. IBIA 02-62 is Frances W. Ankerpont. For the reasons discussed below, the Board dismisses Ankerpont's appeal and affirms Judge Heffernan's October 31, 2001, order.

Docket No. IBIA 02-62

A document signed by Ankerpont was received by the Board on March 4, 2002. The document had been filed with the Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs (BIA), who construed it as an appeal and forwarded it to Judge Heffernan. Because McCook's appeal was then pending before the Board, Judge Heffernan forwarded Ankerpont's document to the Board. The Board could not determine from the document whether Ankerpont was attempting to appeal Judge Heffernan's October 31, 2001, order or whether she was seeking reopening of Decedent's estate on other grounds. The Board therefore ordered Ankerpont to clarify her intent and, if she intended to appeal the October 31, 2001, decision, to show that her appeal was timely.

Ankerpont did not respond. Therefore, her filing is dismissed as an untimely appeal from Judge Heffernan's October 31, 2001, order.

Docket No. IBIA 02-29

Decedent executed a will on July 2, 1996, in which he devised his entire estate to Maxine Manning and Deanna Penningjack, who were described in the will as friends who had

cared for Decedent. Decedent died on March 9, 1997. In preparation for the probate of his trust or restricted estate, BIA submitted information to the Office of Hearings and Appeals concerning his family history. The information included a certification from a BIA Realty Specialist that her research into Decedent's family history had revealed no living relatives.

The initial hearing in Decedent's estate was held by Judge Heffernan on August 27, 1997. A second hearing was held on April 28, 1999, by Administrative Law Judge Nicholas T. Kuzmack. Both hearings were attended by a number of people, at least some of whom claimed to be Decedent's relatives. McCook attended the second hearing and was represented by counsel at that hearing. 1/ At the conclusion of the second hearing, Judge Kuzmack advised the parties that a briefing schedule would be established during which they could present their arguments. There was a lengthy delay in establishing a briefing schedule, apparently because of difficulties in having tapes of the hearings copied and provided to counsel for the parties. On May 25, 2001, Judge Heffernan established a briefing schedule. No briefs were filed.

On August 10, 2001, Judge Heffernan issued a decision in which he approved Decedent's will. He also held that Decedent had no identifiable heirs and found that there was insufficient evidence to support either the relationship claimed by Wilson Johnson et al. or the relationship claimed by another group of individuals.

McCook and Delores L. Arrowchis filed a petition for rehearing. The petition stated in its entirety:

> We, Carmelita J. McCook and Delores L. Arrowchis are filing a petition for re-hearing on Decision dated August 10, 2001, signed by Honorable Judge James Heffernan. The grounds upon which this appeal is based are:
>
> • Hearing information was prejudicial and pre-determined and information on behalf of other parties was not presented at conducted hearings.
>
> • We have evidence of missed information concerning estate and treatment of [Decedent].
>
> • We question validity of will of [Decedent] and question how it was accepted not in accordance with [BIA] guidelines.

1/ McCook is not shown in the record as having attended the first hearing. However, the same attorney who represented McCook at the second hearing represented "Wilson Johnson and his nieces and nephews" at the first hearing. Tr. of Aug. 27, 1997, Hearing at 4. McCook is evidently one of Wilson Johnson's nieces.

As discussed further below, McCook signed a document titled "Claim of Heirship," which was submitted on Aug. 27, 1997.

> We have other extended family members who are questioning this decision and they will enjoin this action when it is appropriate. We will be represented by legal counsel and will present evidence to support our claims at appropriate hearing. Thank you for consideration concerning this matter, we will mail original document and fax this courtesy copy for consideration.

Judge Heffernan denied the petition on October 31, 2001. He held that the petitioners lacked standing to petition for rehearing. On that point, he stated:

> Petitioners fail to show heirship under the intestacy statutes of the State of Utah. It is not enough that Petitioners claim to be collaterally related to Decedent, **Petitioners must show that they are lineal descendants of the maternal or paternal grandparents of Decedent**. As Petitioners have failed to proffer evidence of this relation, they do not have standing to petition for rehearing. [2/]

Order Denying Petition for Rehearing at 2. Judge Heffernan also held that the petitioners had failed to allege any new evidence concerning Decedent's will that would warrant rehearing. Finally, he found that the petition was not under oath, as required by 43 C.F.R. § 4.241(a).

In her notice of appeal to the Board, McCook states that her appeal is based upon newly discovered evidence which shows that she is Decedent's heir. She contends that she "acted with all due diligence after learning of this matter on 10 August 2001" 3/ and that she "searched many records including [BIA] records and LDS Church [4/] historical and genealogical records, finding clearly that she is an heir of [Decedent]." McCook's Notice of Appeal at 2. She attaches documents to her notice of appeal and opening brief which she identifies as "Records from the LDS Church Genealogical Archives." McCook's Opening Brief, Exhibit D.

2/ The record does not show that Arrowchis ever claimed to be related to Decedent. Her name does not appear at all in the record of the original probate proceedings. In a Dec. 19, 2001, affidavit which McCook submitted with her notice of appeal to the Board, Arrowchis stated that she was a tribal health worker who provided services to Decedent.

Although Judge Heffernan evidently misunderstood Arrowchis' role, he undoubtedly would have reached the same conclusion concerning her standing had he known her true role.

3/ By "this matter," McCook presumably meant Judge Heffernan's initial decision, which was issued on Aug. 10, 2001. To the extent she meant to suggest that she first became aware of the heirship issue on that date, her statement is soundly refuted by the record.

4/ I.e., the Church of Jesus Christ of Latter Day Saints.

McCook should have submitted her new evidence to Judge Heffernan with her petition for rehearing. Further, as required by 43 C.F.R. § 4.241(a), she should have explained in her petition why she did not submit the evidence earlier.

43 C.F.R. § 4.241(a) provides:

> If the petition [for rehearing] is based on newly-discovered evidence, it must be accompanied by affidavits or declarations of witnesses stating fully what the new testimony is to be. It must also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision.

McCook failed to comply with this requirement. Even on appeal to the Board, McCook makes no attempt to explain why her new evidence could not have been discovered and presented earlier. This is particularly puzzling in light of the fact that McCook has clearly been aware for some time that the LDS genealogical library might have information relevant to her claimed relationship to Decedent. Her knowledge is evidenced by a document in the probate record titled "Claim of Heirship," which states that it was submitted on August 27, 1997 (the date of the first hearing in this estate). The document was signed by seven claimants, including McCook, and states in part: "As proof of such relationship [to Decedent] the claimants submit the copies of records of the Whiteriver Band Ute Indian Vital Records, as is maintained by the Family History Center of Roosevelt Branch of the Church of Jesus Christ of Latter Day Saints." Despite this statement, no copies of records are attached to the Claim of Heirship. Even so, the statement shows that McCook was aware of this resource in 1997.

Having failed to present and justify her new evidence on rehearing, McCook now attempts to present it to the Board. The Board has a well-established practice of declining to consider evidence presented for the first time on appeal. E.g., Smith v. Acting Eastern Oklahoma Regional Director, 38 IBIA 182, 185 (2002), and cases cited therein. In light of McCook's total failure to justify the late submission, her new evidence need not be considered now.

Even if the Board were to consider McCook's new evidence, it would find that evidence unpersuasive. McCook claims to be related to Decedent through her grandfather Tim Johnson, who she claims was the brother of Decedent's mother, Mianna. Of the historical documents she submits, only one mentions a Tim Johnson. This is a record for Mianna, 5/ which, under a section titled "Brothers," shows the name Tim Johnson, followed by a question mark. The question mark suggests that the recorder of this information was not certain of the relationship. This document is not persuasive evidence that Tim Johnson was Mianna's brother.

5/ McCook does not identify the document, and the document itself has no title or other identifying information. However, it is almost certainly a BIA document.

McCook also submits two family tree charts. One shows that it was prepared by McCook herself on November 29, 2001. The other does not show when or by whom it was prepared. Neither includes any documentation whatsoever. Neither is persuasive evidence of a relationship between Mianna and Tim Johnson.

McCook's claim that Tim Johnson was Mianna's brother is flatly contradicted by the documentation submitted by BIA during the original probate proceedings. That documentation included the sworn testimony of Mianna, as well as the sworn testimony of two other witnesses, at the 1940 probate hearing for Yellowstone, Whiteriver Ute Allottee No. 267. All three witnesses testified that Mianna was the only issue of her parents. If the Board were to consider McCook's new evidence, it would find her evidence greatly outweighed by the sworn testimony in Yellowstone's probate.

In any event, the Board follows its well-established practice and declines to consider McCook's new evidence.

In order to have standing to seek rehearing, a person must be a "party in interest" within the meaning of 43 C.F.R. § 4.201. E.g., Estate of Joseph Noel Simpson, 36 IBIA 67 (2001); Estate of Gilbert Yellowwolf, 36 IBIA 65 (2001); Estate of Frank Nelson Buffalomeat, 34 IBIA 120 (1999). Section 4.201 defines "party in interest" to mean "any presumptive or actual heir, any beneficiary under a will, any party asserting a claim against a deceased Indian's estate, and any Tribe having a statutory option to purchase interests of a decedent." McCook does not show that she falls within this definition.

McCook fails to show that she had standing to petition for rehearing. Therefore, the Board finds that Judge Heffernan properly denied her petition for rehearing.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal in Docket No. IBIA 02-62 is dismissed, and Judge Heffernan's October 31, 2002, Order Denying Petition for Rehearing is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge